



evidence presented including the surveillance video of claimant performing activities that she testified she could not do. Respondent and its insurance fund believe that if the Judge had viewed the video as the doctors who treated claimant had, the Judge would not have found claimant to be disabled. Therefore, respondent and its insurance fund request that the Board review all of the evidence, especially the video, and reverse the Judge by finding that claimant does not have an impairment.

In her brief to the Board, claimant requests that the Board average the ratings of Drs. Brown and Murati and find that she has a 37 percent permanent partial impairment of function to her right upper extremity. Claimant also argues that the opinions of Dr. Chan should be disregarded. Claimant testified in her defense that she did not mean to say that she never uses her right hand, and that although she tries not to use her right hand, on occasion she does use it as it is her dominant hand.

The only issues before the Board on this appeal are:

1. Is the discovery deposition that was taken of claimant on April 1, 2004, part of the record for determining claimant's potential award?
2. What is the extent of claimant's permanent functional impairment?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' briefs and oral arguments, the Board finds and concludes:

The parties stipulated that on August 15, 2003, claimant sustained accidental injury arising out of and in the course of her employment with respondent. Claimant was helping to strip wax from a floor for respondent when she slipped on some cleaner and fell backwards, injuring her right arm. A few days after the fall, claimant was in severe pain. Claimant testified that she informed her supervisor and was referred for medical treatment.

In August 2003, claimant saw Dr. Melhorn, who diagnosed mild carpal tunnel syndrome in her right wrist. That diagnosis was indicated by nerve conduction tests. Claimant was then referred to Dr. Prince Chan who diagnosed reflex sympathetic dystrophy (RSD) as she had color changes from her right wrist down into her palm and fingers. Dr. Chan recommended that claimant undergo a series of ganglion block injections. But when those injections did not improve claimant's pain, Dr. Chan changed his diagnosis and concluded that claimant did not have RSD.

In February 2004, claimant again saw Dr. Chan for a follow-up visit. The doctor released claimant to return to work without restrictions and advised her to use her right arm as much as she could tolerate. In mid-March 2004, Dr. Chan issued a statement that

claimant had sustained a one percent functional impairment to her right upper extremity as measured by the *AMA Guides*<sup>1</sup> (4th ed.).

At her attorney's request, claimant saw Dr. Pedro A. Murati on March 3, 2004, to be evaluated for purposes of this claim. Dr. Murati found claimant's right wrist pale and the doctor also found claimant's right hand cool to touch. The doctor diagnosed complex regional pain disorder, which he believed comprised a 51 percent functional impairment to the right upper extremity. Similar to Dr. Chan, Dr. Murati testified that claimant should use her right arm as much as possible.

At Judge Barnes' request, claimant saw Dr. C. Reiff Brown on September 15, 2004, for an independent medical examination. Dr. Brown found claimant had minor causalgia involving sensory deficit and pain impairment and initially rated claimant as having a 41 percent impairment to her right upper extremity. He did not assign any restrictions because claimant should use her right hand as vigorously as possible.

Not long after claimant saw Dr. Brown, respondent hired a private detective to obtain video surveillance of claimant. And through this surveillance, claimant was videotaped performing some of the tasks she said she had problems performing.

After Dr. Chan saw the surveillance video, which was approximately 40 minutes in length, he lowered his opinion of claimant's functional impairment from one percent to the right upper extremity to none. Likewise, Dr. Brown reviewed the video and lowered his functional impairment opinion. In essence, Dr. Brown indicated claimant's impairment for sensory dysfunction and pain would be closer to 20 to 25 percent rather than the 31 percent he initially believed. Moreover, Dr. Brown indicated claimant probably had more impairment exceeding the 20 to 25 percent rating because of weakness, which he would be unable to rate without examining her again.

Dr. Murati did not review the surveillance video. But the doctor testified that his opinions regarding claimant's functional impairment would not change if he knew claimant could perform some of the activities shown on the video.

The Judge determined claimant sustained a 25 percent functional impairment to her right arm and the Board agrees. Although claimant testified at the regular hearing that she was unable to do certain activities with her right arm, she later clarified on redirect examination that she continued to use her right arm and that she was not testifying that she never used that arm. Moreover, Dr. Murati indicated that claimant's symptoms would wax and wane.

Dr. Brown was brought into this claim to render an unbiased opinion. The Board is persuaded by Dr. Brown's testimony that claimant has RSD and the Board is likewise

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

persuaded that Dr. Brown's initial 41 percent functional impairment rating was too high in light of the surveillance video. On the other hand, Dr. Brown thought he detected claimant holding her right arm in an abnormal manner on the video. Accordingly, the doctor modified his opinion of claimant's functional impairment.

Distilled to its essence, the record contains Dr. Chan's zero percent functional impairment rating to the right upper extremity at the low end and Dr. Murati's 51 percent rating to the right upper extremity at the high end. The Board concludes that claimant's impairment falls somewhere between those extremes and, therefore, the Board concludes claimant has sustained a 25 percent functional impairment to the right upper extremity, which is where Dr. Brown's rating ultimately settled.

The parties did not agree that claimant's deposition, which was taken for discovery purposes, was part of the record for purposes of determining claimant's final award. Moreover, counsel for respondent and its insurance fund acknowledged at page 13 of the regular hearing transcript that the discovery deposition was not part of the record. Accordingly, the discovery deposition is excluded from the record.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated July 19, 2005, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James B. Zongker, Attorney for Claimant  
Anton C. Andersen, Attorney for Respondent and its Insurance Fund  
Nelsonna Potts Barnes, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director